STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

WILLIAM A. CARTER,

a Judge of the Albany City Court,
Albany County.

- -

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.[1]
Marvin E. Jacob, Esq.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

Walter, Thayer & Mishler (by Mark S. Mishler) for the Respondent

[1] Mr. Harding was appointed to the Commission on June 29, 2006. The vote in this matter was taken on June 22, 2006.

The respondent, William A. Carter, a judge of the Albany City Court, Albany County, was served with a Superseding Formal Written Complaint dated December 7, 2005, containing three charges. Respondent filed a verified answer dated December 28, 2005.

On April 10, 2006, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and providing for briefs and oral argument on the issue of sanctions or, in the alternative, that the Commission impose the sanction of censure without briefs or argument. The Commission accepted the Agreed Statement on April 20, 2006, and scheduled briefs and argument on the issue of sanctions.

Each side submitted memoranda as to sanction. Commission counsel recommended removal, and respondent's counsel recommended a sanction no greater than censure. On June 22, 2006, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a judge of the Albany City Court, Albany County since January 1, 2002. He is an attorney.

As to Charge I of the Superseding Formal Written Complaint:

2. On or about August 17, 2004, Talib Alsaifullah was arrested and charged with Assault, 3d Degree, and was incarcerated in lieu of $5,000 bail set by

Albany City Court Judge Thomas K. Keefe.

3. In October 2004, respondent arraigned Mr. Alsaifullah on an additional charge of Loitering, which also allegedly occurred in August 2004. Respondent set bail at $500. Mr. Alsaifullah remained incarcerated.

4. Respondent ordered that Mr. Alsaifullah be produced in court on November 22, 2004, as a result of a letter Mr. Alsaifullah had written to the court expressing concerns about the sufficiency of the accusatory instrument charging him with Assault and about the representation provided him by the public defender.

5. At the November 22, 2004, proceeding, Mr. Alsaifullah was represented by an assistant public defender, who stated at the outset of the proceeding that it was his understanding that the defendant wished to discharge the public defender and proceed *pro se*. Respondent questioned Mr. Alsaifullah concerning his contention that the accusatory instrument was defective because he had not been given a copy of the domestic incident report or advised by the court that he had a right to be prosecuted by Information as opposed to Complaint.

6. Respondent allowed the defendant to argue his position, and after the defendant became agitated and said he no longer wanted to participate in the proceeding because he claimed it was illegal, respondent became angry and, without adjourning the proceeding, abruptly removed his glasses, got up from the bench, removed his judicial robe and dropped it to the floor and proceeded rapidly in the direction of the defendant, in a manner indicating his purpose was to confront the defendant. Respondent was upset at the time of the incident and does not recall what he was thinking at the time he proceeded

toward the defendant, but agrees that his conduct indicated his intent to confront the defendant.

7. One witness present in the courtroom heard respondent say of or to the defendant, "You want a piece of me?" Respondent does not recall making this statement, because he was upset at the time of the incident, but he does not deny making the statement.

8. As respondent left the bench, Police Officer Timothy Corbitt, who was responsible for guarding the defendant in the courtroom, quickly removed the defendant from the courtroom through a clerk's office. Another police officer, Mark Leonardo, physically blocked respondent's path by placing himself in front of respondent, who was headed in the direction of the clerk's office. Respondent tried to go around Officer Leonardo by stepping to one side and then another, but Officer Leonardo continued to block respondent by sidestepping along with him each time. Although respondent came within inches of Officer Leonardo, respondent did not touch the officer, and the officer did not touch or use physical force to restrain respondent. Officer Leonardo suggested that respondent leave the courtroom by another door. Respondent complied with Officer Leonardo's suggestion and did not pursue the defendant.

9. As the defendant was being escorted out through an adjoining courtroom where court was in session before another Albany City Court Judge, the defendant loudly exclaimed that respondent was trying to hit him.

10. Respondent is approximately 5'6" tall and weighs approximately 165 pounds. The defendant is approximately 5'8" tall and weighs approximately 168

pounds. Officer Leonardo and respondent are of similar size and build. Officer Corbitt is of significantly bigger build than the defendant and respondent. Officer Leonardo is of similar build as respondent and the defendant. There is no claim of ethnic or other bias-related motivation for respondent's conduct. Both respondent and the defendant are African-American.

11. On November 22, 2004, the police returned Mr. Alsaifullah to the Albany County Jail.

12. The following day, in the absence of the defendant, his attorney, or the prosecution, respondent placed his recusal from the *Alsaifullah* case on the record, without specifying any reason for the recusal.

As to Charge II of the Superseding Formal Written Complaint:

13. On or about March 29, 2005, respondent conducted an arraignment of the defendant in *People v. Charles Willis* on a Class E felony charge of Possession of Imitation Controlled Substance, 2nd Degree, and on misdemeanor charges of Trespass, 3rd Degree, Resisting Arrest, Criminal Impersonation, 2nd Degree, and Criminal Possession of a Controlled Substance, 7th Degree.

14. Respondent granted Assistant District Attorney David Erlich's motion to amend two of the charges. Mr. Erlich then recommended that bail be set in the amount of $25,000.

15. Respondent released the defendant on his own recognizance, notwithstanding that pursuant to Section 530.20(2)(a)(ii) of the Criminal Procedure Law,

respondent was required to remand the defendant without bail, since the defendant had two prior felony convictions.

16. At the conclusion of the arraignment, after being informed by the arresting officer William Van Amburgh that the defendant, who was still in the courtroom, had just displayed his middle finger toward the officer in the courtroom, respondent told the officer that he had not observed the defendant's alleged conduct and therefore was not going to take any action. Officer Van Amburgh expressed dissatisfaction with the judge's statement, and respondent said, "If you are so upset about it, why don't you just thump the shit [out] of him outside the courthouse, because I am not going to do anything about it."

17. Respondent informed the defendant that the police were angry with respondent for releasing him, that the police were angry with the defendant and that the defendant should "stay out of trouble."

18. Respondent was aware at the time of the *Willis* arraignment that he was under investigation by the Commission for his conduct with respect to the *Alsaifullah* matter.

As to Charge III of the Superseding Formal Written Complaint:

19. As set forth under Charge II, *supra*, respondent released Charles Willis contrary to the requirements of Section 530.20(2)(a)(ii) of the Criminal Procedure Law, notwithstanding that by letter of dismissal and caution dated February 5, 2004, respondent was cautioned by the Commission to observe the requirements of the

Criminal Procedure Law in making his bail determinations. The February 2004 letter of dismissal and caution was issued to respondent after he acknowledged that in March 2003, (A) he had failed to disqualify himself from the arraignment of four defendants who had been charged with Harassment on the complaint of respondent's then co-judge, Cheryl Coleman, and (B) he had set bail on each defendant at $1,000, without inquiring into the factors required for setting bail set forth in Section 510.30(2) of the Criminal Procedure Law.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(2) and 100.3(B)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I, II and III of the Superseding Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

The ethical rules require every judge to be an exemplar of dignity and decorum and to preside over disputes in a lawful, orderly manner (Rules Governing Judicial Conduct §§100.3[B][2] and 100.3[B][3]). Respondent has acknowledged that on two occasions he violated those standards, first by losing his composure and angrily leaving the bench to confront a defendant and, a few months later, by making a flippant comment to a police officer in which he suggested the use of physical violence towards a defendant. As respondent has conceded, his conduct was injudicious and utterly

inexcusable.

In the first incident, after defendant Talib Alsaifullah, charged with Assault and Loitering, became agitated and said he did not want to participate in the proceeding because it was, he said, "unlawful," respondent angrily left the bench, threw off his glasses and judicial robes, and proceeded rapidly towards the defendant. To reach the well of the courtroom, respondent had to go out a door behind the bench and re-enter the court through another door. According to one witness, respondent said to the defendant, "You want a piece of me?", and respondent does not deny making that statement. Although a police officer quickly removed the defendant from the courtroom and another officer physically blocked respondent from pursuing the defendant, the defendant continued to yell that the judge was trying to hit him. This unseemly episode, in which respondent appeared on the verge of initiating a physical confrontation with the defendant, was an egregious breach of judicial decorum. *See Matter of Richter*, 42 NY2d (aa), 409 NYS2d 1013 (Ct. on the Judiciary 1977); *Matter of Allman*, 2006 Annual Report 83 (Comm. on Jud. Conduct). As this Commission has stated, "Self-control is an essential element of judicial temperament," and "crossing the line from verbal to physical confrontation is not just improper, but fundamentally inimical to the role of a judge." *Matter of Allman, supra.*

Some four months later, respondent made a crude comment from the bench in which he appeared to encourage the use of physical violence by a police officer against a defendant. According to the officer, the defendant, Charles Willis, had just made an offensive gesture after being released. Respondent told the officer, who was upset that

respondent was not going to do anything about the gesture, "If you are so upset about it, why don't you just thump the shit out of him outside the courthouse, because I am not going to do anything about it." On its face, respondent's remark is outrageous. It suggests to a police officer, and to anyone else who heard respondent's words, that the court sanctioned violence as an acceptable means of retaliating against unruly defendants. Respondent claims that the comment was not intended literally and did not reflect a loss of composure, but was a way of telling the officer to stop overreacting (respondent, a former police officer, characterized the comment as "cop speak"). Even if not meant literally, such a statement could aggravate heightened emotions and has no place in a judicial forum, where emotions should be tempered and issues resolved in a peaceful, orderly manner.

Significantly, respondent made the remark in *Willis* at a time when he knew he was under investigation by the Commission for the *Alsaifullah* incident.

The Commission has held that such comments are antithetical to a judge's obligation to be "patient, dignified and courteous" to litigants and others and to observe and maintain appropriate standards of decorum. *See Matter of Esworthy*, 77 NY2d 280 (1991) (in a proceeding involving an order of protection, judge called the parties "pigs" and "liars" and said, "If you kill each other, fine"); *Matter of Trost*, 1980 Annual Report 153 (Comm. on Jud. Conduct) (judge said during a proceeding, "As a matter of fact, these two people ought to get shotguns and get themselves in a room and kill each other"; told a litigant in another case, "Some night you ought to hit him on the head with an axe and it will be all over"; told another litigant's lawyer, "Why don't you give each of them

a gun?...Let them use it"). In *Trost*, the Commission explicitly rejected the judge's explanation that it was effective at times for a judge to address litigants "at their own level" in order to be fully understood. The judge was censured in 1979 for these and other lapses of judicial decorum.

In addition, the parties have stipulated that respondent erred in releasing the defendant in *Willis* since the Criminal Procedure Law required that the defendant be remanded because of his prior felony record (CPL §530.20[2][a][ii]).

In determining an appropriate sanction, we have considered several mitigating factors.

Notably, in the *Alsaifullah* case, the record reflects that prior to the incident respondent was concerned about ensuring that the defendant was treated fairly, that the defendant's due process rights were protected, and even that he pronounced the defendant's name correctly. Indeed, respondent had placed the case on the calendar that day in response to the incarcerated defendant's letter expressing concerns about his representation by the public defender and other issues. Such conduct suggests that respondent's behavior, though inexcusable, was an aberration by an otherwise diligent, dedicated judge.

We also note that respondent has been cooperative and contrite throughout this proceeding.

As is apparent from the views expressed in the dissenting and concurring opinions, this is a difficult case that is very close to removal. While it is beyond dispute that respondent's misconduct is deplorable and warrants a severe sanction, we conclude

that he should be censured rather than removed from office. As the Court of Appeals has stated: "[R]emoval is the ultimate sanction and should be imposed only in the event of truly egregious circumstances." *Matter of Kiley*, 74 NY2d 366, 369-70 (1989); *Matter of Steinberg*, 51 NY2d 74, 83 (1980). Here, although respondent's conduct was egregious, we believe that a sufficient basis for removal is lacking, especially in view of the mitigating factors described above. The dissent correctly states that this case is more serious than *Matter of Allman, supra.* Nevertheless, we cannot conclude that it rises to the level of removal.[2]

In this regard, we note that there is a wide gap between the available sanctions of censure and removal. We have previously urged the legislature to consider a constitutional amendment providing suspension from office without pay as an alternative sanction available to the Commission (Annual Reports, 2002, 2000, 1997). We believe that such a sanction is appropriate for cases in which the judge's conduct is truly egregious but does not irretrievably damage the judge's effectiveness on the bench. Were suspension available to us, we would impose it in this case to reflect the severity with which we view respondent's conduct. Absent that alternative, we have concluded that a censure should be imposed.

This disposition should not be read as suggesting that conduct similar to respondent's could never rise to a level warranting removal. As the Court of Appeals recently stated, "Judicial conduct cases are, by their very nature, *sui generis*" (*Matter of*

[2] Notably, contrary to the thoughts expressed in the concurring opinion, we find the record neither "inadequate," nor the Agreed Statement "deficient."

Blackburne, 7 NY3d 213, 219-20 [2006]). Indeed, such decisions "are essentially institutional and collective judgment calls based on assessment of their individual facts" (*Matter of Roberts*, 91 NY2d 93, 97 [1997]) along with mitigating or aggravating factors.

This decision places respondent on notice that any future ethical lapses will be viewed with appropriate severity.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Mr. Felder, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Jacob and Judge Peters concur, except that Mr. Felder and Mr. Coffey dissent as to Charge III and vote that the charge is not sustained.

Judge Klonick and Judge Ruderman dissent only as to the sanction and vote that respondent be removed from office.

Judge Luciano was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: September 25, 2006

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
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CONCURRING OPINION
BY MR. EMERY

- -

Once again the Commission faces the unenviable task of disciplining a judge on an incomplete record. *See Matter of Clark* (Emery Dissent). Once again we are presented with an Agreed Statement seeking to have the Commission impose a sanction – in this case removal – without a hearing that would have developed a detailed record and findings. The Commission initially rejected the Agreed Statement, advising counsel that the record, "in the Commission's view, requires full development at a hearing before a referee." We were then presented with a renegotiated Agreed Statement, containing some additional facts, which the Commission voted to accept. Because I believed that the Agreed Statement in this case does not provide an adequate basis for removal, leaving unresolved thorny factual questions that if resolved might well mandate removal, I dissented from accepting the Agreed Statement. I continue to believe – contrary to the view of my colleagues – that the Commission has the authority and duty to direct that a full hearing be held in this case, and any others like it, where factual issues remain

unresolved. Therefore, I am constrained to concur in the result here because of the inadequacies of the Agreed Statement even though I might well have voted to remove respondent if the record had been properly developed.

Since my vote in this case is necessary to reach the requisite minimum number of six commissioners to reach a result, I find this qualification to my concurrence to be particularly troubling. The simple fact is that the censure in this case is the direct result of an inadequate Agreed Statement rather than a thorough and thoughtful decision based on the plenary proceeding we should have required in this case.

As the Commission's decision describes, respondent behaved erratically and inexcusably on two occasions: first, when he attempted to physically attack a defendant who was not sufficiently appreciative of respondent's concern for the defendant's due process rights; and, second, when he suggested that a police officer "thump the shit out of [the defendant] outside the courthouse." With respect to the first incident, the Agreed Statement leaves open central factual gaps. Most significantly, the description of what occurred is so sparse and so equivocal that it cannot be determined from this record whether the officers prevented the judge from assaulting the defendant (as staff argued in recommending the sanction of removal) or whether the judge had any intent to commit an assault (which the judge's attorney denies). The stipulated language that the judge's conduct "indicated his intent to confront the defendant" permits staff to argue that the judge was on the verge of assaulting the defendant, and permits his attorney to argue, with equal justification, that no confrontation occurred.

To me, a finding as to the judge's intent, as determined by a fully

developed record including respondent's own testimony, subject to cross-examination at a hearing, is critical on the issue of whether he should be censured or removed. Equally critical, in my view, is a determination as to whether and how the judge was physically restrained. If the judge came off the bench and was struggling in the well of the public courtroom in order to attack the defendant, he should be removed. If he came off the bench and attempted to confront the defendant and was easily deterred without any physical contact, the case is more like *Matter of Allman*, where the judge was censured for coming off the bench and confronting a lawyer in open court by grabbing his arms and insisting that the lawyer "listen." On such a crucial issue, a reliable determination of what occurred requires the testimony of all of the witnesses who were available, not negotiated findings in which conflicting versions might be discarded or softened to reach a compromise acceptable to both sides. Moreover, when the negotiated "facts" are vague and the stipulated language (*e.g.*, "intent to confront') permits each side to present diametrically opposing scenarios as to what took place, the Commission is left guessing what actually happened. Clearly, there were many witnesses to the event in open court. Had there been a hearing – with examination and cross-examination – the Commission would have available a full record of all available testimony, and, most importantly, the factual findings of a referee. As a matter of policy, the Commission should not have to make a decision as to discipline in any case on a record so inadequate – particularly, as here, when the sanction of removal has been sought by Staff.

Also troubling is the stipulation that while one witness heard the judge say as he approached the defendant, "You want a piece of me?", the judge neither recalls

making the statement nor denies making it. The Commission infers from those stipulated facts that he made the statement, but that is an inference, not a stipulated fact or a finding by a referee. A decision to discipline a judge should be based on facts, not inferences. It seems clear that the stipulation was negotiated to permit the Commission to conclude that the statement was made without requiring the judge to admit making the statement, but that is an exercise in semantics. In that context, the judge's refusal to acknowledge that the statement was made and his purported failure to recall key details of the episode raise concerns about his forthrightness.

The Agreed Statement is deficient in other respects. The judge's statement, appended to and incorporated in the Agreed Statement (see par. 24) contradicts the Agreed Statement by denying that he was "angry." The judge's appended statement contradicts the Agreed Statement on the question of whether he was ejected from the courtroom or left voluntarily. Finally, there is no indication of whether or when the judge realized his conduct was aberrant and, importantly, the record does not reveal whether he ever apologized to anyone.

The second incident and charge is, in some respects, even more serious than the first. It took place four months after the first, at a point when the judge knew that the Commission was investigating him about the first incident. Therefore, it is crucial to understand whether the judge's comment – "why don't you just thump the shit out of him" – was understood as a sarcastic remark or whether it was heard as a serious statement. Both are inexcusable, but a serious recommendation to engage in physical violence under these circumstances presents a basis to conclude that the judge is a

continuing threat to the public. This, after all, is the Commission's core responsibility. (*Matter of Reeves*, 63 NY2d 105, 111 [1984]). And the Agreed Statement is opaque on this central issue.

We have no evidence from those in the courtroom who may have heard the statement, including the complaining police officer. At the oral argument before the Commission, the judge, a former police officer himself, characterized the comment as "cop speak." Was he alluding to a history of police brutality or at least physical revenge by the police? Why would he joke about that? Did he not realize that his words could be taken seriously? This could have been developed on cross-examination. The judge's later warning to the defendant that he should "stay out of trouble" because the police were angry at him should also be explored. On the surface, the judge's warning makes it more likely that his original statement to the police officer was serious. At a minimum, the judge's warning to the defendant in this setting, after what he had said to the police officer, was independent misconduct and completely inappropriate.

After our decision in *Matter of Blackburne* and the Court of Appeals' affirmance of Justice Blackburne's removal for allowing a defendant to avoid a new arrest, the constellation of allegations against respondent takes on a most alarming hue. But what we do not know from this record is what actually happened in respondent's courtroom and what others in the courtroom perceived. Clearly, there was a serious degradation of justice taking place during these incidents. How serious, we will never know.

I am inclined to agree with the dissent, and I suspect that the dissent's

characterization of the facts is correct and that respondent should be removed. But the dissent's approach to the record makes my point with respect to the inadequacy of the Agreed Statement because it reaches well beyond the Agreed Statement by which we are supposedly bound. For instance, on the central question of whether the judge had to be physically restrained after he left the bench and approached the defendant to confront him, the dissent appears to indulge in the inference that "respondent was physically prevented from making contact with the defendant" and that the event "escalated to a level which required physical intervention by several officers" (Dissent, pp. 1, 2). Though I suspect that the dissent is correct in describing what actually occurred, the Agreed Statement specifically restricts our consideration to the fact that while the officer "physically blocked" respondent's path, "respondent did not touch the officer, and the officer did not touch or use physical force to restrain respondent" (Agreed Statement, par. 8). If one dances on the head of a pin, all these statements might be viewed as literally consistent; however, I believe it is the Commission's responsibility to clarify what seems to me to be a practical and plain contradiction that is at the core of this decision.

Similarly, throughout the dissent, in order to support its description of the events, the dissent relies on statements made by respondent's counsel and by respondent, extracted in the course of questioning during oral argument, to expand a record left bare by the Agreed Statement. The dissent characterizes respondent's state of mind as "out of control" (Dissent, p. 2), based in part on respondent's statements during oral argument, rather than on a record and findings developed based on direct testimony and cross-examination. Given the obvious tactical pressure under which such statements are

elicited, I think it behooves us to rely on admissible evidence and findings rather than concessions made during a ten-minute presentation by the judge before a panel that could well exercise "career capital punishment." *See Matter of Blackburne* (Emery Dissent).

Finally, the Agreed Statement by itself raises more questions than it resolves by appending and explicitly incorporating a statement by respondent as to what his testimony would be if he were to testify at a hearing (Agreed Statement, par. 24). As one would expect, respondent's testimony downplays his anger, minimizes the seriousness of the events and exaggerates his contrition and the asserted mitigating circumstances. This procedure – allowing judges to append statements to Agreed Statements – is not helpful. In this case, any reasonable inference drawn from the appended statement contradicts the reasonable inferences inherent in the Agreed Statement. If the appended statement is part of the record, then we, in effect, do not have an Agreed Statement. Certainly, any judge accepting a plea bargain would never accept an allocution that resembled the self-serving, exculpatory remonstrations incorporated by reference into this record. In my view, the appended statement by itself requires that a full factual record be developed, if only to allow for a response to respondent's assertions.

I write the above not to criticize the dissent, with which, after the *Blackburne* decision, I probably would agree if it were based on a completed record and findings; or the staff, which is forced by its limited resources and overwhelming caseload to negotiate Agreed Statements. Moreover, I recognize that Agreed Statements are important, not only to conserve the very limited resources of the Commission, but also to

lessen the financial, emotional and vocational burdens on judges who choose to resolve allegations of misconduct efficiently. But where a judicial career and our responsibility to the public to protect it from unfit jurists (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a], [lll]) are at stake, I believe a more rigorous and conceptually disciplined approach than we see in this case is required. At a minimum, a far more complete and unequivocal Agreed Statement must be framed if removal is to be an option.

In fact, the import and tenor of the opinions of my fellow commissioners do not radically differ from my view that the Agreed Statement is inadequate to make the "right" decision in this case. Where we differ is our view of whether our acceptance of the Agreed Statement hog-ties us as a matter of contract, double jeopardy and/or due process, or whether our constitutionally mandated responsibility to protect the public from unfit judges overrides these concerns and requires the additional process of a hearing. The due process concerns are plainly nonsense: a plenary hearing provides more "process", not less, for the respondent to defend himself fully. Similarly, double jeopardy is inapposite in the administrative, non-criminal, context. The contract argument – that we are bound by our acceptance of the Agreed Statement – has more weight. But courts, as a matter of discretion, regularly reopen records after both sides rest. (*See, e.g.*, FRCP 52[b].) And administrative agencies have even more leeway than courts in the context of regulating government officials. *See, e.g., In re Rizza*, 288 AD2d 795, 733 NYS2d 308 (3rd Dep't 2001) (affirming decision by Unemployment Insurance Appeal Board to return matter to administrative judge for further development of factual

record); *In re Dialogue Systems Inc.*, 231 AD2d 756, 647 NYS2d 300 (3rd Dep't 1996) (same). Plainly, the public policy inherent in our constitutional mandate to protect the public from martinets posing as judges overrides this misconceived notion of a restraint on our authority. This is not an enforceable contract; it is a stipulation between litigating parties mistakenly accepted by the ultimate decision-maker. That mistake cannot be allowed to frustrate our mandate.[1]

I have personal doubts that, except in the most exceptional circumstances, we should ever remove a judge without a full hearing. As I demonstrated at some length in my dissent in *Matter of Clark*, I think it is clear that, consistent with our constitutional mandate, we have the authority and duty to remand a case for fact-finding when the record presented to us is inadequately developed. This is plainly such a case and, I believe, we have failed in our duty by not directing that a hearing be held. Nonetheless, I join the majority on the basis that what is clear and undisputed in this incomplete record supports at the very least a sanction of censure. I suspect that the public would be better served and protected if Judge Carter were removed. However, I cannot reach that result on the record before us.

Dated: September 25, 2006

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

[1] Notably, our rules (22 NYCRR §7000.7) do not address this issue, one way or the other. But the inference that a remand for added fact-finding is authorized can be drawn from the assiduous separation of the Staff's "prosecutive function" (§7000.7[b]) as distinct from the Commission's determinative function.

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DISSENTING OPINION
BY JUDGE RUDERMAN,
IN WHICH JUDGE
KLONICK JOINS

- -

I respectfully dissent from the determination of censure and vote to remove respondent. In my view, respondent's misconduct as stipulated to in the Agreed Statement is egregious and demonstrates a total lack of self-control and the necessary judicial temperament; thus rendering him unfit to serve as a judge.

In the *Alsaifullah* case, the record established that respondent angrily left the bench to confront a defendant, threw off his judicial robes and his glasses, and aggressively proceeded toward the defendant in a confrontational manner. A witness' statement that respondent then said to the defendant, "You want a piece of me?" was unrefuted by respondent.

But for the quick intervention of two police officers, who removed the defendant from the courtroom and physically blocked respondent from pursuing the defendant, the incident might well have escalated. The fact that respondent was physically prevented from making contact with the defendant should not redound to his

credit. Respondent's own statements to the Commission indicate that he was so agitated that he does not recall what precipitated his loss of composure (Oral argument, pp. 44-45). He also purportedly has no recollection of throwing off his robes (Oral argument, p. 45) and maintains that he "does not recall what he was thinking" as he approached the defendant (Agreed Statement, par. 6). Respondent's state of mind and inability to retain the details of such a significant series of events evidence how out of control he was at that time.

Respondent's unseemly conduct is even more egregious given the context of his inability to regain his composure when, as explained by his attorney at oral argument, respondent had to leave the bench, go out one door and enter the well of the courtroom through another door. Despite this elapsed time frame, respondent was not able to stop what could have been merely a momentary lapse. Rather, it appears that respondent's temperament was beyond his control and the circumstances escalated to a level which required physical intervention by several officers. Respondent's conduct indicates a total lack of the self-restraint and the essential temperament to perform effectively his judicial duties. *See*, *Matter of Gibbons*, 98 NY2d 448, 450 (2002) (judge's anger was not a mitigating factor to a single incident that otherwise warrants removal from office); *Matter of Cerbone*, 61 NY2d 93, 95-96 (1984) ("respect for the judiciary is better fostered by temperate conduct [than] by hot-headed reactions to goading remarks").

It is shocking for a judge, in open court, to offer himself as a willing combatant when a judge's role is to maintain a neutral atmosphere in the courtroom.

Respondent's conduct is outrageous, appalling and brings disgrace to the bench by implicitly suggesting that physical violence is an acceptable means toward resolution. Indeed, officers present in the courtroom are there to assist in maintaining a certain decorum in the judicial process of reaching a resolution on the merits. It is anticipated that, at times, despite counsels' attempts to control their clients, a highly emotional litigant may become unruly. It is not to be anticipated that the judge presiding over the matter may be the one who needs to be restrained.

This incident is considerably more serious than the conduct in *Matter of Allman*, which resulted in the judge's censure. In *Allman*, the judge's argument with a lawyer escalated when the judge, after calling a recess, came down from the bench and placed his hands on the lawyer's arms while stating, "All I want you to do is listen to me." (The judge quickly withdrew his hands when the lawyer objected that the judge was "touching" him.) This case is even more egregious. Here, respondent's crude, bellicose language to the defendant ("You want a piece of me?") was an invitation to physical violence and a direct challenge to engage the defendant. Respondent's belligerent manifestation of a readiness to resolve a courtroom disagreement in such an aggressive, street-like manner flies in the face of the very reason litigants in our society proceed to court, *i.e.*, for an orderly and civilized resolution of disputes on the merits.

Additionally, in *Allman* the judge stepped back from the confrontation, and his unprompted, repeated apologies presented significant mitigating factors that are not present in this case. Judge Allman was censured for that single instance of misconduct, which was "an isolated lapse in an otherwise unblemished record."

This case presents more than a single incident. Respondent's comment in the *Willis* case is also deeply troubling. A remark by a judge that appears to condone and even encourage the use of physical violence to resolve disputes is fundamentally inimical to the judicial process. Even if respondent did not intend the comment to be taken literally, the fact that he made the remark during a time he knew he was under scrutiny by the Commission, when he was presumably on his best behavior, is a further indication of his lack of judgment and self-control. Based on this record, I am not persuaded that the public can have any confidence in the expectation that respondent will effectively perform his duties as a judge in the future.

I recognize that the ultimate sanction of removal is reserved for misbehavior that is "truly egregious" (*Matter of Kiley*, 74 NY2d 364, 369-70 [1989]) and that "exceed[s] all measure of acceptable judicial conduct" (*Matter of Blackburne*, 7 NY3d 213, 221 [2006]). I believe that the totality of respondent's misconduct meets those standards and has irretrievably damaged public confidence in his ability to properly carry out his judicial responsibilities.

Accordingly, I vote for removal.

Dated: September 25, 2006

Terry Jane Ruderman

Hon. Terry Jane Ruderman, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

WILLIAM A. CARTER,

a Judge of the Albany City Court,
Albany County.

OPINION BY MR. COFFEY CONCURRING IN PART AND DISSENTING IN PART, IN WHICH MR. FELDER JOINS

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While I concur that respondent should be censured for his misconduct as stipulated in Charges I and II, I respectfully dissent from the finding of misconduct as to Charge III and vote to dismiss the charge. In my view, the finding that respondent's legal error constitutes judicial misconduct is plainly wrong and sends an unfortunate, confusing message to the judiciary.

Respondent released Charles Willis at arraignment although the Criminal Procedure Law required that the defendant be remanded because he had two prior felony convictions (CPL §530.20[2][a][ii]). Respondent claims, without contradiction in the record, that at the time he arraigned the defendant he focused primarily on deficiencies in the five accusatory instruments before him (two of which were amended at the arraignment). Although he acknowledges that he released the defendant without considering the above statute and, apparently, without focusing on the defendant's prior convictions, I cannot conclude that his error rises to the level of judicial misconduct.

Under the statute, a local court may not order recognizance or bail when "it appears that" a defendant who is charged with a felony has two previous felony convictions. Significantly, the record in *Willis* reflects that the prosecutor recommended that bail be set at $25,000, indicating that not even the prosecutor was aware that the law required that the defendant be remanded without bail. By all accounts, respondent simply erred in not focusing on the pertinent statute, and as a result the defendant was released.

While every judge is required to know and follow the law and while respondent was wrong in his decision, his error did not involve a well-established legal principle, nor did it deprive a defendant of a fundamental right or result in a defendant's unlawful incarceration (*compare*, *Matter of Bauer*, 3 NY3d 158 [2004]). Moreover, there is no indication that respondent acted based on favoritism or any improper influence.

In our Annual Reports setting forth our findings and decisions rendered during the previous year, we hope and, in fact, expect that judges throughout the state will familiarize themselves with our findings. But, with the finding of misconduct herein, what message are we now imparting?

Novel in its import, our decision quite simply puts judges on notice that they may very well be subject to our scrutiny if they make a simple legal mistake which hurts no one. Moreover, it is quite likely that the majority's unprecedented finding of misconduct could well intimidate judges who will legitimately become more fearful of making potentially controversial decisions, believing they could be disciplined for doing so. In fact, it is not a stretch to foresee that the long term effects regarding this particularly minor transgression will be much more far reaching than the rest of the

decision herein. The ramifications of the majority's finding of misconduct, based on a single legal mistake and what it will convey to judges, cannot in my mind be underestimated.

The Commission's finding of misconduct is apparently based in significant part on the respondent's having previously been cautioned for violating the Criminal Procedure Law in making a bail determination. That reliance seems misguided, in fact irrelevant, in my view. The prior caution involved a case in which respondent set $1,000 bail on each of four defendants, in a case in which his co-judge was the complaining witness, without considering the factors prescribed by law. Respondent's conduct in that case, which resulted in the defendants' incarceration, was contrary to well-established principles of law, and he was appropriately cautioned. In the *Willis* case, respondent's conduct involved a different statutory provision, one that does not involve a self-evident legal principle, and, most significantly, there was no harm to the defendant as a result of respondent's error. Accordingly, there is simply no basis for concluding that respondent in any way violated the prior caution. To use the prior caution to punish him for a subsequent, unrelated legal error is unfair, unwarranted, unnecessary and, in my opinion, unjust.

Accordingly, I dissent from the finding of misconduct as to Charge III.

Dated: September 25, 2006

Stephen R. Coffey, Esq., Member
New York State
Commission on Judicial Conduct